No. 17310

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SOUTHERN CALIFORNIA ASSOCIATED NEWSPAPERS, A CORPORATION D/B/A SOUTH BAY DAILY BREEZE, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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INDEX

AUTHORITIES CITED

Cases:

Cases—Continued

Statute:

Miscellaneous:

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JURISDICTION

This case is before the Court on petition of the National Labor Relations Board for enforcement of its order issued against respondent on February 9, 1961, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151 *et seq.*).[1] The Board's decision and order (R. 20-26)[2] are reported at 130 NLRB No. 14.

[1] The relevant statutory provisions are reprinted *infra*, p. 14.

[2] References to portions of the printed record are designated "R." Whenever a semicolon appears, the references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

This Court has jurisdiction under Section 10(e) of the Act, the unfair labor practices having occurred in Redondo Beach, California, where respondent is engaged in the business of publishing, selling and distributing a daily newspaper (R. 8; 3-4, 7, 251).

STATEMENT OF THE CASE

I. The Board's Findings of Fact

Briefly, the Board found that respondent, in violation of Section 8(a)(1) and (3) of the Act, questioned employee David Clark about his union membership and thereafter discriminated against him in an effort to impede or delay union organization of its mailroom. The subsidiary facts upon which these findings rest may be summarized as follows:

Clark first worked for respondent for about a 3-year period commencing in 1954 (R. 9; 38, 58-59, 253). At that time his job consisted of delivering newspapers to homes under the supervision of various district managers, including Walter Collins, who subsequently became respondent's circulation manager (R. 9; 251, 253). In July 1958, Clark began working full-time for respondent as a fly boy (R. 9, 20; 38). The duties of a fly boy consist of taking newspapers from the press, or from the conveyor leading from the press, to the mailroom and there preparing mailing wrappers for them (R. 9, 20; 39, 66-67).

In December 1959, the time of the incidents herein, respondent's mailroom employees were not represented by a union (R. 301). Clark's rate of pay in December 1959 was $1.50 an hour (R. 10; 59, 106, 257). This was less than half the rate unionized mailing employees in

the Los Angeles area were then receiving (R. 10; 107-108). Because of this disparity in wages, as well as dissatisfaction with other conditions of his employment, Clark met with an organizer for the Union[3] on Tuesday, December 15, and joined the organization (R. 10; 40, 118-119, 182).

Within a day or two after Clark joined, a representative of the Union visited respondent's plant (R. 15-16; 259-260). Circulation Manager Collins, who supervised the mailroom, including Clark, heard about the visit and also about the fact that Clark's membership had been solicited (R. 9, 16; 40, 251-253, 259-260, 261). On Friday, December 18, Collins asked Clark whether he had been contacted by the Union (R. 12, 20; 40-41, 261). When Clark replied affirmatively, Collins wanted to know what the union representative had spoken to him about, what Clark thought of the Union, and whether Clark had a union card (R. 12; 41, 261). Clark told Collins what he and the union representative had talked about, and Clark stated that he thought the Union was a "good deal" (R. 41).[4]

The following day, Saturday, December 19, Collins for the first time offered Clark a "trainee" position, which had never before existed, in respondent's circulation department (R. 12; 42-43, 162). In contrast to the fly boy job, which was entirely inside the plant, the trainee position would entail traveling away from respondent's premises with the various district circu-

[3] Mailers Union, Local 9, International Typographical Union, AFL-CIO.

[4] Later the same day, Collins made inquiries of respondent's publisher, Curry, to find out whether the Union had been in touch with him about representing the mailroom employees (R. 262, 295).

lation managers, in order for the trainee to become familiar with the district managers' job of promoting business and supervising boys who deliver papers to homes (R. 65-68, 252, 272-273). The trainee also was to assist the district managers whose duties included, in addition to soliciting business, providing carriers with newspapers and receiving money they collected, and tying and bundling newspapers for the various routes (R. 65, 272-273, 312). The effect of Clark's taking the trainee position would have been to remove him from the mailroom group which the Union was attempting to organize—a group which included employees who performed inside functions only.[5]

That same day, shortly after the trainee position had been offered to Clark, Collins, in a discussion with Clark's father, stated that he knew at the time he offered young Clark the trainee position that he was a member of the Union (R. 110, 300).[6] Collins added that he did not want the Union in the mailroom because he wanted complete control of it, that there was no need for a union at that time, and that when there was

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[5] In accordance with the statement of the Union's jurisdiction set forth in its constitution, the Union was not seeking to represent respondent's district managers and no effort was made to recruit them into the organization (R. 156, 175-179, 195, 200-201, 319-320). Contracts held by the Union with other newspapers comparable to the size of respondent's in the Los Angeles area cover only employees who work in the "newspaper plant between the time that the newspaper is printed and the time it is delivered to the dealers' trucks" (R. 153-154, 156, 158, 200, 203). The Union's contract with Hillbro Newspaper Printing Company, introduced in evidence by respondent, illustrates the organization's jurisdictional policy of limiting coverage to individuals who work on the employer's premises (R. 154, 203-205, 328-329).

[6] Collins testified that he was aware that Clark's father was also "a union man" (R. 283).

need for it the mailroom employees would be unionized (R. 110-111, 301).

On the next working day, Monday, December 21, Collins told Clark that if he did not accept the trainee job he could not keep his job as a fly boy (R. 13; 44, 46, 80, 95). Clark refused the transfer, and his employment was terminated immediately (R. 21, 13; 46-47, 48, 87). At the time of Clark's termination, no new fly boy had been hired to replace him (R. 21; 46-47). The following day when Clark returned to the plant to pick up his check, Collins again brought up the subject of the Union by stating, "We're not big enough to be union. Maybe some day, but not right now" (R. 48-50, 288-289, 301).

II. The Board's Conclusions and Order

Upon the foregoing facts, the Board, in disagreement with the Trial Examiner, found that respondent violated Section 8(a)(3) and (1) of the Act by offering employee David Clark a transfer and, upon his refusal thereof, discharging him. The Board concluded that respondent's treatment of Clark was discriminatory and violative of the Act because it was motivated by a desire to delay or impede union organization of the mailroom and that it was undertaken in the belief, on Collins part, that it would accomplish that result.[7]

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[7] The Trial Examiner recommended dismissal of the complaint on the grounds (1) that since the job offered Clark was more attractive than the one he then held, the action did not inhibit union organization; and (2) that Collins was mistaken in believing that if Clark accepted the new job he could no longer be represented by the Union (R. 18-19). Since, it is evident that the Board's reversal of he Trial Examiner stems from its disagreement with him as to the conclusions to be drawn from established facts, and

The Board further found that respondent violated Section 8(a)(1) of the Act by Collins' questioning of Clark about his union membership (R. 21-22). The Board ordered respondent to cease and desist from the unfair labor practices found, to reinstate Clark with backpay and to post appropriate notices (R. 23-24).

ARGUMENT

Substantial Evidence Supports the Board's Finding That Respondent, in An Effort to Impede Unionization of Its Employees, Discriminated Against Employee David Clark, and Thereby Violated Section 8(a)(3) and (1) of the Act.

The key factual determination in this case, on which both the Board and Trial Examiner are in agreement, is that "Collins believed taking Clark out of the mailroom would delay or impede Union organization, and that upon learning of Clark's Union membership Collins refused to permit him to continue his current job in the mailroom based on the belief that the new job might prevent him from being represented by the Union" (R. 21, 17). It is plain from the evidence summarized in the Statement, *supra,* that this finding is supported by the record. Thus, for a year and a half Clark had been employed by respondent as a fly boy, but immediately upon Collins' learning that Clark had joined the Union, and that there was a danger of the Union's achieving representation rights in the mailroom, Collins offered Clark another job to get him

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the Examiner's credibility findings were left undisturbed, the Board's action in reversing him does not impair the validity of its findings. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 493-496; *F.C.C.* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, 364; *J. I. Case Co.* v. *N.L.R.B.*, 253 F. 2d 149, 155-156 (C.A. 7).

out of that phase of respondent's operations. Nor was there anything indirect about Collins' handling of the matter. The offer was made to Clark on a "take-it-or-else" basis and when Clark on the next workday turned down the offer, he was discharged on the spot—and this despite the fact that he had been employed by respondent on a full or part-time basis for four and a half years. Such summary and harsh treatment of Clark, a long-time employee, hardly bespeaks the concern for Clark's welfare which Collins asserted motivated him in his dealings with the employee over the years (R. 255, 279). Rather, it attests to the overriding concern with which Collins viewed the threat of unionization in the mailroom, and the urgency with which he sought to meet the threat.

Respondent, before the Board, denied that the timing of Collins' job offer to Clark gives rise to an inference that union considerations influenced the action. But "[i]t stretches credulity too far to believe that there was only a coincidental connection between" Clark's joining the Union on Tuesday, Collins' interrogation of him about the matter on Friday, and the "abrupt" move to take him out of the mailroom on Saturday, at a time when there was no one else available to perform his work. *Angwell Curtain Co. Inc.* v. *N.L.R.B.*, 192 F. 2d 899, 903 (C.A. 7).[8]

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[8] The Trial Examiner properly characterized as "spurious" (R. 17) Collins' testimony that he received the publisher's approval for the establishment of the trainee position on December 15, but that he waited until December 19 to tell Clark about it (although Clark was at work during all the intervening days), because the 19th was the day the transfer to the new job would have taken effect, and it

The fact that union considerations were the dominant reason for offering the trainee job to Clark is further revealed by Collins' course of conduct in connection with the incident. Thus, Collins' close questioning of Clark on December 18 about the Union is evidence of the importance that Collins attached to Clark's union adherence.[9] The day of the discharge Collins, in conversation with Clark's father, stated that he was aware of the son's union membership, and further asserted that he "didn't want the Union in the mailroom because he wanted complete control of [it]" (R. 110-111). Finally, Collins' conduct toward Clark on the day the latter returned to the plant to pick up his check is additional evidence that the threat of unionization was the motivating factor in the decision to remove Clark from the mailroom. Thus, after asking Clark whether he had changed his mind about

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was Collins' custom to inform an employee after a new rate took effect (R. 13-14; 275-278, 294, 301-302). As the Trial Examiner found, the lack of basis for this testimony is disclosed by the fact that although respondent's pay period ends on a Friday (Clark was offered the job transfer on a Saturday, the first day of a new pay period), Collins testified on a *Thursday* and yet he stated that he was going to inform two men *that day* that they were to receive increases (R. 14; 175, 302, 306). Furthermore, if the decision to transfer Clark to the trainee position had been reached between Collins and Curry on December 15, as Collins testified, there would have been no reason for Collins to write Curry the detailed interoffice memorandum later, the day after Clark received his final pay check, in which Collins asked permission to pay Clark for his final day's work at the trainee's rate instead of the fly boy's rate (R. 272-273, 304-305, 321).

[9] It is well settled that such interrogation has a "natural tendency to instill in the minds of employees fear of discrimination on the basis of the information the employer has obtained," and therefore is violative of Section 8(a)(1) of the Act. *N.L.R.B.* v. *West Coast Casket Co.*, 205 F. 2d 902, 904 (C.A. 9); *N.L.R.B.* v. *Radcliffe*, 211 F. 2d 309, 314 (C.A. 9), certiorari denied, 348 U.S. 833.

accepting the transfer to another position, Collins introduced the subject of the Union by stating "We're not big enough to be union. Maybe some day, but not right now" (R. 49-50, 301).[10]

Before the Board, respondent contended that even if it had been motivated by a desire to delay organization of its employees in offering Clark the trainee position, its conduct did not violate Section 8(a)(3) of the Act because the trainee position was a better job than the fly boy job, and therefore the offer was not discriminatory and did not tend to discourage union membership. The Trial Examiner similarly believed that the complaint should be dismissed because the job offered Clark was better than the one he held.[10a] This line of reasoning is without merit, however, for the term "discriminate" does not necessarily comprehend

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[10] Plainly without substance is respondent's assertion that it discharged Clark when it did in order to vacate the fly boy position for someone whom it eventually intended to hire as a district manager trainee. No such trainee had been hired at the time of the hearing, more than three months after Clark was discharged, nor had a new fly boy been hired at the time of Clark's discharge (R. 309-310). Respondent thus leaves unexplained the haste with which the action was effected. Moreover, the record fails to establish the relation between the functions of the fly boy, which respondent asserts is essential to the trainee's learning process, and the work performed by the district managers. In fact, Collins admitted that a district manager would not be hindered by a lack of knowledge of the fly boy's job (R. 311). It is apparent, therefore, that there was no need to vacate the fly boy position at all.

[10a] There is no question of course that an offer of a better job to an employee as an inducement to abandon union activity violates Section 8(a)(1) of the Act. *Carpenteria Lemon Assn.* v. *N.L.R.B.*, 240 F. 2d 554, 558 (C.A. 9), certiorari denied, 354 U.S. 909; *Sunshine Biscuits, Inc.* v. *N.L.R.B.*, 274 F. 2d 738, 740 (C.A. 7).

a change in the employment relationship which is detrimental to the employee affected. By standard definition the word merely means "to serve to distinguish; to mark as different; to differentiate." *Webster's New International Dictionary,* Second Edition (1959). Accordingly, if as respondent concedes *arguendo,* its disparate treatment of Clark was for an antiunion purpose, the discrimination contemplated by the Act was effected. This conclusion is in accord with settled law which recognizes that the protection of the Act extends "to all elements of the employment relationship which in fact customarily attend employment * * *" (*N.L.R.B.* v. *Waterman Steamship Corp.,* 309 U.S. 206, 218) without regard to whether the change is detrimental to the employee. Thus, a change in the seniority status of an employee, when occasioned by his participation in a lawful strike, violates Section 8(a)(3) (*Olin Mathieson Chemical Corp.* v. *N.L.R.B.,* 232 F. 2d 158 (C.A. 4), affirmed, 352 U.S. 1020), even though such a change merely has a potential detrimental effect on the employee's job tenure or earnings. A transfer from one job to another based on considerations of union membership similarly violates the statute without regard to, or proof of, the nature of the new position. *N.L.R.B.* v. *Star Publishing Co.,* 97 F. 2d 465 (C.A. 9); *N.L.R.B.* v. *Gluek Brewing Co.,* 144 F. 2d 847 (C.A. 8); *South Atlantic Steamship Co.* v. *N.L.R.B.,* 116 F. 2d 480 (C.A. 5); *Combined Century Theatres, Inc.,* 123 NLRB 1759, 1762, enforced in pertinent part, 278 F. 2d 306 (C.A. 2). And see, *N.L.R.B.* v. *Fairmont Creamery Co.,* 143 F. 2d 668, 671 (C.A. 10); *Allis-Chalmers Mfg. Co.* v. *N.L.R.B.,* 162 F. 2d

435, 440 (C.A. 7); *Continental Oil Co.* v. *N.L.R.B.*, 113 F. 2d 473, 484 (C.A. 10). In sum, the fact that respondent took steps to transfer Clark to another job as a consequence, as we have seen, of his union membership, establishes the propriety of the Board's conclusion that respondent thereby violated Section 8(a)(3) and (1).

But respondent did not stop with merely offering Clark the transfer to another job. It gave him the alternative of accepting the transfer or being discharged. When Clark refused the transfer, his discharge promptly followed, and respondent had accomplished its purpose of impeding unionization of its mailroom. Respondent, at the hearing, candidly admitted the discriminatory character of the choice offered Clark when it stated, there was "no question here but what he couldn't keep the fly boy job and he knew it" (R. 95). This admission belies respondent's claim that Clark was not discharged but that he resigned voluntarily, for obviously an employer may not give an employee a choice between being discriminated against and resigning, and when the employee chooses the latter, plead immunity from the processes of the Act. It is manifest that discouragement of union membership was "a natural and foreseeable consequence" (*Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 52) of the method resorted to by respondent to rid itself of the threat of unionization.[11]

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[11] See also *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793, 798, 800; and cf. *N.L.R.B.* v. *G. W. Thomas Drayage & Rigging Co.*, 206 F. 2d 857, 860 (C.A. 9); *N.L.R.B.* v. *J. G. Boswell Co.*, 136 F. 2d 585, 595-596 (C.A. 9); *N.L.R.B.* v. *National Motor Bearing Co.*, 105 F. 2d 652, 658-659 (C.A. 9).

The Trial Examiner found that Collins' action in offering Clark a better job and taking him out of the mailroom was bottomed on the mistaken belief that such action would remove Clark from the Union's jurisdiction and thus delay organization of the mailroom.[12] Accordingly, the Examiner, on the basis of his finding that Collins' belief was mistaken, recommended dismissal of the complaint. The Board disagreed with the Examiner's conclusion, holding, in effect, that even if Clark had been able as a trainee to maintain his membership in the Union and even if the Union under those circumstances would have continued to represent him, such considerations did not absolve respondent from liability for its unlawful action. The Board's decision in this respect is in accord with the established principle that an employer may not defend conduct otherwise unlawful under the Act on the ground that he was mistaken as to the ultimate effect of such conduct. *N.L.R.B.* v. *Link-Belt Co.*, 311 U.S. 584, 589-590; *N.L.R.B.* v. *J. G. Boswell Co.*, 136 F. 2d 585-595 (C.A. 9; *N.L.R.B.* v. *Piezo Mfg. Co.*, 290 F. 2d 455, 456 (C.A. 2); *N.L.R.B.* v. *Ridge Tool Co.*, 211 F. 2d 88 (C.A. 6), enforcing, 102 NLRB 512, 513.

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[12] It is doubtful if Collins' belief was in fact mistaken, for the Union's constitution specifically confines the organization's jurisdiction to employees working inside a newspaper plant, thereby excluding those, such as respondent's district managers, who work away from the premises (R. 175, 319-320, and see *supra* p. 4, n. 5). The Trial Examiner's reference (R. 15) to *American Publishing Corp.* 121 NLRB 115 is inapposite because it involved a different local union operating under a different constitution, in another part of the country, and in an industry other than newspaper publishing.

CONCLUSION

For the foregoing reasons it is respectfully submitted that a decree should issue enforcing the Board's order in full.[13]

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AUGUST 1961.

[13] Although the complaint alleged the Act to be violated only by virtue of the discharge of Clark, whereas the Board found the offer of the job transfer also to be discriminatory, respondent cannot show that it was prejudiced as a result of this variance. It is not necessary for a complaint to allege every facet of the unlawful conduct involved in a proceeding where, as here, it is clear from the evidence presented and the record of the hearing that the respondent "understood the issue and was afforded full opportunity to justify [its conduct] as innocent rather than discriminatory." *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 349-350. Accord, *N.L.R.B.* v. *Armato*, 199 F. 2d 800, 804 (C.A. 7); *Eagle-Picher Mining & Smelting Co.* v. *N.L.R.B.*, 119 F. 2d 903, 910 (C.A. 8).

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

APPENDIX B

References to Exhibits Pursuant to Rule 18 (2) (f) of the Court

(Pages refer to printed record)

General Counsel's exhibits

No.	Identified	Offered	Received In Evidence
1C	35	36	36
1E	35	36	36
3	176–177	177	177
4	304	305	305

Respondent's exhibits [14]

No.	Identified	Offered	Received In Evidence
4	203	204	205
5	51, 236	233–235	236

[14] None of the items printed as respondent's exhibits 1, 2, and 3 were part of the record. Respondent's exhibits 1 and 3 were identified, but never offered in evidence. No item was identified, on the record, as respondent's exhibit 2.

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